In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1100

GOVERNMENT OF GUAM, PETITIONER

v.

ATKINS-KROLL (GUAM) LTD., A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

In its brief in opposition respondent argues (1) that the decision of the lower court is correct and (2) that the question is now moot.

1. THE COURT OF APPEALS' DECISION IS NOT CORRECT

(a). Respondent argues that if A.K. Guam had operated as a branch of A.K. California, rather than as a subsidiary corporation, it would have been liable only for one tax at the 50 percent rate (Br. Opp., pp. 4–5). In general, when corporations elect to do business through subsidiaries, they are subjected to two taxes—one on the subsidiary's earnings and one on the repatriation of the earnings. On the other hand, where a corporation does business through a branch, it is subjected to only one tax. For example, where a foreign corporation establishes a United States branch,

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the earnings are subject to only one tax at the 50 percent rate (1954 Code § 882); if it establishes a United States subsidiary, the earnings are subject to two taxes which usually aggregate approximately 65 percent. 1954 Code § 11 (50% tax on U.S. subsidiary's earnings) and § 881 (30% tax on dividends paid to foreign parent).

In electing to do business in Guam through a subsidiary corporation, rather than a branch, A.K. California's management presumably weighed the various disadvantages, including tax, against the advantages of its choice, such as limited liability, freedom of the parent from regulation by Guam, and transferability of the equity interest in the subsidiary. Having elected the corporate form, it cannot now claim a right to be taxed as if it had chosen a branch operation. See *National Carbide Corp.* v. *Commissioner,* 336 U.S. 422, 438–439; *Moline Properties, Inc.* v. *Commissioner,* 319 U.S. 436.

(b). Respondent also argues that § 31(e) of the Organic Act of Guam, which authorizes "changes in nomenclature and other language [of the Internal Revenue Code] * * * necessary to effect the intent of this section," required the courts to reduce the tax rates, just as was done in several instances by treaty between the United States and certain foreign countries (Br. Opp. pp. 5–6). However, § 31(e) was not intended to allow the courts to rewrite the Code and to insert concepts of "equity" into the Guam tax law on a case-by-case basis. It is for Congress to determine if the imposition of both a tax of 50 percent on the corporate earnings of a Guam corporation and a tax of 30 percent on the after-tax earnings when they

are paid to its United States parent as a dividend is inequitable and, if it so determines, to make appropriate changes in the law.

The fact that the United States has entered into bilateral treaties which reduce the withholding tax below 30 percent in some instances (Pet. 10, fn. 14) is no authorization for the courts to achieve a similar result here. By making a treaty the President can, with the advice and consent of the Senate, reduce the 30 percent tax rate stated in Code § 881. *Cf.* 1954 Code §§ 894, 7852(d). While the United States cannot enter into a treaty with one of its possessions, Congress can, of course, at any time, amend the Organic Act of Guam to reduce the 30 percent withholding tax if it so chooses. In the absence of Congressional action, § 31(e) of the Organic Act does not authorize the courts to modify the basic scheme of the Code or to amend the rates.[1]

(c) Finally, respondent argues that Congress must have intended Guam to collect less than a combined tax of 65 percent in order "to encourage American business enterprise in Guam" (Br. Opp., pp. 7–8). The field of economic development of possessions, as connected with taxation, is a stringently regulated area. Congress has enacted a number of Code provisions granting tax benefits for investing in possessions, but none of them applies in the instant case.[2] Congress has also authorized and some United States possessions have adopted programs granting tax exemptions or sub-

[1] See *Government of Guam* v. *Koster*, 362 F. 2d 248 (C.A. 9).

[2] 1954 Code, §§ 48(a)(2)(B)(vii), 931, 955(c)(3); Executive Order No. 11, 071, 27 F.R. 12875 (1962).

sidies to certain industries in limited circumstances.[3] During the tax years here in question Guam had no such program. Respondent's argument is, in effect, that Congress must have intended the courts to reduce the Guam tax rates. However, the legislative history to which respondent refers (Br. Opp., pp. 7–8) reflects no Congressional intent that taxpayers such as A.K. California should receive a tax reduction when they do business in Guam through a subsidiary corporation. On the contrary, it reflects an intention that Guam should support itself from its own resources, including, under § 881, dividends paid to foreign corporate shareholders who do business in Guam through a subsidiary.

2. THE CONTROVERSY IS NOT MOOT

The judgment of the court of appeals was entered on September 30, 1966 (Pet. 25). Since no stay was obtained, the court of appeals mandate was issued 30 days thereafter (Rule 26, Rules of the Court of Appeals for the Ninth Circuit), and on December 21, 1966, the district court entered judgment for respondent ordering a refund with costs and interest. On December 28, 1966, Harold W. Burnett, Attorney General of Guam, transmitted to the Commissioner of Revenue and Taxation of Guam a copy of the Ninth Circuit's mandate and the district court's judgment and requested that a refund check be prepared (App.

[3] As to the Virgin Islands, see 33 Virgin Islands Code Ann., §§ 4041, 4,061, 4071 (1966 Cum. Pocket Supp.); 26 U.S.C. § 934; H. Rep. No. 1131, 86th Cong., 1st Sess. 3–6 (1960–2 Cum. Bull. 811, 812–815). As to the Commonwealth of Puerto Rico's much broader program, see 13 Laws of Puerto Rico Ann., §§ 252, 252a, 252b (1966 Cum. Pocket Supp.); Revenue Act of 1926, c. 27, 44 Stat. 9, § 261, as amended (48 U.S.C., § 845); Act of March 4, 1927, c. 503, 44 Stat. 1418, § 1, as amended (48 U.S.C., § 741).

infra, p. 9). On January 20, 1967, such a check was issued (App. *infra,* pp. 9–10).

When, on December 28, the Attorney General of Guam directed that a refund check be issued, he knew (having received notice the day before, December 27) that the Supreme Court had, only six days earlier, extended the time within which a petition for a writ of certiorari could be filed to February 27, 1967, and that the question whether a petition should be filed was under active consideration. However, he directed the refund "in response to mandate of the Ninth Circuit, and with no intention of settling the matter" (App. *infra,* p. 12).

In fact, respondent does not claim to have been misled by the refund. In a letter written to the Solicitor General shortly after the refund was made, counsel for respondent stated (App. *infra,* p. 10):

> We assume that the payment of the amount in controversy disposes of the case and that there will be no further proceedings. However, so far as we know neither the taxpayer nor its counsel has ever received any formal advice that a writ of certiorari would not be requested and, since the time within which to file does not expire until nearly a month from now, we would appreciate your confirming that our understanding is correct.[4]

And a recent exchange of correspondence between the Attorney General of Guam and counsel for respondent, which was designed to confirm previous oral dis-

[4] The Department of Justice replied by telephone that there was a good possibility that a petition for certiorari would be filed and that the government did not consider that the case had been mooted by the refund.

cussions between them, makes it clear that the refund was made in response to the mandate of the Ninth Circuit and with no intention of settling the case (App. *infra*, pp. 10–12).

Under these circumstances, the refund did not render the case moot. This Court set out the governing principles in *Dakota County* v. *Glidden*, 113 U.S. 222, where the plaintiff sued on certain bonds and recovered judgment. The county brought a writ of error, but then settled with the plaintiff by giving him new bonds, and the old bonds on which the suit was brought were surrendered and destroyed. In sustaining a motion to dismiss, this Court reasoned (pp. 224–225):

> *There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money.* And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. *In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.* And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other

respect, its right to prosecute this writ of error would have remained unaffected.

But what was done was a very different thing from that.

A new agreement, on sufficient consideration, was made, by which the judgment itself, the coupons on which it was recovered, and the bonds of which these coupons were a part, were all surrendered and destroyed, and other bonds and other coupons were accepted in their place, payable at a more distant date and with a lower rate of interest, with the effect of extinguishing the judgment now sought to be reversed, so that the plaintiff in that judgment could not issue execution on it, though there is no supersedeas bond, to secure its payment. [Emphasis added.]

See also *Cahill* v. *New York, N.H. & H.R. Co.,* 351 U.S. 183, 184; *United States* v. *Hougham,* 364 U.S. 310, 312–313, where the Court reasoned that when the government sought certiorari in an effort to increase its judgment against the respondent, the government did not moot the case by accepting payment of the judgment, since the parties must have understood "that the payment was without prejudice to the rights of either party as those rights might come to be established by subsequent judicial decree." And see *Woodson* v. *Chamberlain,* 317 F. 2d 245, 246, where the Fourth Circuit noted that "The usual rule in the federal courts is that payment of a judgment does not foreclose an appeal. Unless there is some contemporaneous agreement not to appeal, implicit in a compromise of the claim after judgment, and so long as,

upon reversal, restitution can be enforced, payment of the judgment does not make the controversy moot."

In view of these authorities, payment of the judgment in this case did not moot the controversy.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
RICHARD C. PUGH,
Acting Assistant Attorney General.
JACK S. LEVIN,
Assistant to the Solicitor General.
HAROLD C. WILKENFELD,
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FRANK J. BARRY,
Solicitor,
EDWARD WEINBERG,
Deputy Solicitor,
Department of the Interior.
HAROLD W. BURNETT,
Attorney General, Government of Guam.

APRIL 1967.

APPENDIX

MEMORANDUM

GOVERNMENT OF GUAM,
Agana, December 28, 1966.

To: Commissioner of Revenue and Taxation.
From: Attorney General.
Subject: Atkins Kroll (Guam) Ltd., Civil Case 56-64.

Transmitted herewith is a copy of the mandate in the above entitled case and a copy of the judgment entered in favor of taxpayer December 21, 1966.

Kindly prepare the check for refund, interest and costs in favor of Barrett, Ferenz & Trapp and taxpayer.

HAROLD W. BURNETT.

Attachments

[Letterhead of McCutchen, Doyle, Brown, Trautman & Enersen]

JANUARY 30, 1967.

Air mail

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530.
(Attention Mildred E. Fanebust).

Government of Guam v. *Atkins, Kroll (Guam), Ltd.*, Supreme Court of the United States.

DEAR SIR: As you have previously advised us, the Supreme Court by order dated December 22, 1966, has extended to February 27, 1967, the time for filing a petition for a writ of certiorari in the above matter.

We are now informed that Atkins, Kroll (Guam),

Ltd. has received from the Government of Guam a check dated January 20, 1967, in payment of the entire amount in controversy in this case, consisting of a refund of tax in the amount of $7,500 and interest through January 20, 1967, in the amount of $2,610. Concurrently the Government of Guam has issued two other checks, one in the amount of $129.57 payable to Atkins, Kroll (Guam), Ltd. and the other in the amount of $38 payable to counsel for Atkins, Kroll (Guam), Ltd., in payment of court costs.

We assume that the payment of the amount in controversy disposes of the case and that there will be no further proceedings. However, so far as we know neither the taxpayer nor its counsel has ever received any formal advice that a writ of certiorari would not be requested and, since the time within which to file does not expire until nearly a month from now, we would appreciate your confirming that our understanding is correct.

Very truly yours,

McCUTCHEN, DOYLE, BROWN,
TRAUTMAN & ENERSEN,
By JOHN B. LOWRY.

[Letterhead of Barrett, Ferenz & Trapp]

MARCH 8, 1967.

HAROLD W. BURNETT, Esquire,
Attorney General of Guam,
Government of Guam,
Agana, Guam 96910.

Re: *Atkins, Kroll* v. *Government of Guam,* United States Court of Appeals for the Ninth Circuit, No. 19,915

DEAR HARRY: I returned to Oakland on March 7, 1967, and learned that the Solicitor General's office had

filed a petition for writ of certiorari in the above matter on February 27th. I presume that you have received a copy of the petition.

On page 14, footnote 16, the petition states that the payment made in January, 1967, by the Treasurer of Guam to the taxpayer was erroneously made under the belief that the time for filing a petition for certiorari had expired. As you will recall, I called on you at your office in Guam on or about February 15, 1967. I do not have independent recollection of the exact day but it was the last day that the airport concession bids could be received by the Director of Commerce. In any event, it was before February 23, 1967, which was the date I left Guam.

While I was in your office we discussed the question of the payment and I inquired specifically as to why payment was made in view of the fact that the time within which to petition for certiorari had not expired. It is my recollection that you acknowledged that payment was made fully aware of the fact that the Solicitor General was still considering whether to petition and with knowledge of the fact that the time within which to petition had not expired.

John B. Lowry, Esquire, of McCutchen, Doyle, Brown, Trautman & Enersen, and ourselves are preparing a reply to the petition which is due on March 30, 1967. We intend to meet the contentions of the Solicitor General with respect to the circumstances of payment as I have outlined above. I would appreciate it if you would advise me if my recollection of our conversation differs in any respect with your recollection.

We expect to be sending our brief to the printer no later than March 22, 1967. Unless I hear to the

contrary by that date, I will assume that your recollection is the same as mine.

Kindest personal regards.

Very truly yours,

BARRET, FERENZ & TRAPP,
/s/ WALTER S. FERENZ.

[Letterhead of the Attorney General of Guam]

MARCH 16, 1967.

WALTER S. FERENZ, ESQUIRE,
Barrett, Ferenz & Trapp,
Penthouse-1924 Broadway,
Oakland, California 94612.

DEAR WALT: Prior to receiving your letter of March 8, 1967, I noted, and advised the Department of Justice of the error in footnote 16, page 14, of our petition for certiorari in the Atkins, Kroll matter. Correction is being made, and I assume you will have received copies by the time this reaches you.

Your recollection of our conversation is essentially the same as mine. I was fully aware that the petition was still under consideration and that the time had not expired. Payment was made in response to mandate of the Ninth Circuit, and with no intention of settling the matter.

Sincerely yours,

HAROLD W. BURNETT,
Attorney General.

cc: Jack S. Levin,
Assistant to the Solicitor General.
Mrs. Ruth Van Cleve,
Director, Office of Territories.

U.S. GOVERNMENT PRINTING OFFICE: 1967